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QUESTIONS PRESENTED

1. Must employee benefit plans which discriminate on the basis of age be justified by age-related cost considerations to qualify for exemption from the ADEA under § 4(f)(2)?

2. May an employee benefit plan continue to discriminate on the basis of age solely because the plan predates the passage of the ADEA?

3. If employee benefit plans which predate the ADEA are permitted to discriminate, do they lose their exemption when substantial changes are made in the plan at a later date?

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STATEMENT OF THE CASE

A. Disability Benefits Under The Public Employees Retirement System Of Ohio.

This case involves the denial of disability benefits to an otherwise qualified individual by the Public Employees Retirement System ("PERS") solely on the basis of her age. While the plan is open to all individuals under the age of 60 with at least five years of service credit, those individuals, such as June Betts, who apply after their 60th birthday are denied disability benefits.[1] Thus, a worker disabled at age 23 may still be receiving disability benefits at age 65, while a worker disabled at age 65 will receive no disability benefits. The plan discriminates against workers like June Betts who become disabled after age 60.

Workers excluded from the disability plan after age 60 may still be entitled to age and length of service retirement ("service retirement") but they will receive substantially lower benefit payments. The parties agree that when the ADEA was passed in 1967 the calculations for determining service retirement benefits and disability benefits under the PERS plan were similar. [PERS Br. p.5]. However, in 1976, nine years after passage of the ADEA, O.R.C. Section 145.36 was changed to provide that no one receiving disability benefits should receive less than 30% of their Final Average Salary ("FAS"). No such minimum is available under service retirement. Thus, workers like Betts, who are disabled after age 60, are denied the 30% minimum available to workers disabled before age 60. Disability benefits continue to be paid

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[1] Ohio Revised Code Section 145.35 [a-21] provides:

"Application for disability retirement may be made by a member . . . provided the member has at least five years of total service credit and *has not attained age sixty* . . . ." (emphasis added)

for the lifetime of the employee and, unlike many other plans, do not convert to the lower service retirement rates.

In addition to lower benefits, workers disabled after age 60 are denied two other benefits due to their exclusion from the PERS disability plan:

1. Those with less than 10 years service are denied free medical coverage for life.[2]

2. Each person excluded from the disability plan is denied a five year leave of absence with a guaranteed right to return to his or her former job or its equivalent with his or her former employer. This right is available to all workers receiving disability benefits but not to workers on service retirement.[3]

Membership in PERS is in lieu of participation in the federal Social Security program. Thus, while most private company employees have pensions in addition to social security benefits, most public employees receive only their PERS benefits.

B. June M. Betts.

June Betts ("Betts") became ill at age 61 in 1985. Her employer, Hamilton County Board of Mental Retardation and Developmental Disabilities ("Hamilton County"), informed her that if she did not apply for length of service retirement with PERS, Hamilton County would initiate

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[2] Ohio Revised Code 145.58 was amended in 1981 to require a new PERS retiree to have 10 years Ohio service credit to qualify for free health care benefits. This amendment did not apply to members receiving disability benefits. The effective date was delayed five years and did not affect appellee.

[3] Ohio Revised Code 145.39.

forced medical leave and she would receive neither pay nor medical benefits. Hamilton County advised Betts that she was not eligible for PERS disability benefits because she was over 60 years of age. Betts was thus forced to apply for service retirement. While PERS describes her retirement as "voluntary," the District Court disagreed, stating that Betts was "presented with a choice of early retirement or nothing."

As a service retiree Betts received only $158.50 per month (13.4% of FAS). Had she not been disqualified because of her age, she would have received disability benefits of $355.02 per month (30% of FAS). Betts was also denied reemployment rights available to disability retirees but not service retirees.

C. The Proceedings Below.

On June 14, 1985, Betts filed a complaint with the United States District Court of the Southern District of Ohio, alleging a violation of the Age Discrimination in Employment Act ("ADEA"), in that she had been denied disability benefits because of her age. The District Court, on March 27, 1986, decided the case on cross-motions for summary judgment. *Betts* v. *Hamilton County Bd. of Mental Retardation*, 631 F.Supp. 1198 (S.D. Ohio 1986) [A-20]. PERS, apparently conceding that the plan would otherwise violate the ADEA, argued that under this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), the PERS disability plan was exempt as a "bona fide" employee benefit plan under § 4(f)(2), 29 U.S.C. § 623(f)(2), because early versions of the plan were in existence before passage of the ADEA. Betts argued that § 4(f)(2) did not apply because the PERS disability plan was not based upon age-related cost justifications. Despite having every opportunity, PERS declined to

introduce any evidence of cost or other economic justification for the discriminatory treatment of employees over 60.

The District Court held that PERS was not entitled to the § 4(f)(2) exception because the exclusion from the plan of persons becoming disabled after age 60 was not "based upon age-related cost factors" as set forth in the EEOC regulations 29 C.F.R. § 860.120, which interpreted § 4(f)(2). The District Court also concluded that Betts was involuntarily retired as a result of her exclusion from the disability plan, a further violation of § 4(f)(2). *Betts*, *supra*, 631 F.Supp. at 1205 [A-28-30].

On appeal, Betts, joined by the EEOC as *amicus*, argued that no economic justification existed for providing the younger employee with disability benefits while denying disability benefits to the older employee. The Sixth Circuit affirmed, agreeing with the District Court that the "critical factor" in determining whether PERS was exempt under § 4(f)(2) was whether the age 60 cut-off for applying for disability retirement benefits was "based upon age-related cost factors as set forth in 29 C.F.R. § 860.120." The Court also held that in amending the ADEA in 1978, "Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines* v. *McMann*." *See Betts* v. *Hamilton County Bd. of Mental Retardation*, 848 F.2d 692, 694-95 (6th Cir. 1988) [A-4-5].

Although this action involves only June Betts, the problem presented is much wider. Two other Ohio retirement and disability plans have provisions identical to the PERS plans. They are the State Teachers Retirement System (STRS) and the School Employees Retirement System (SERS). At the present time, two class actions raising the

same ADEA issues are pending in the Southern District of Ohio against all three Ohio plans. *See EEOC* v. *PERS*, No. C-1-87-216 and *George* v. *State of Ohio*, No. C-1-86-635.

SUMMARY OF ARGUMENT

The PERS disability plan, which permits only those employees who *"have not attained age sixty"* to apply for disability retirement, is discriminatory on its face. PERS claims the disability plan is exempt under § 4(f)(2) of the ADEA which exempts a:

> "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, . . . and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual. . ."

PERS is not entitled to an exception under § 4(f)(2) because it failed to produce any evidence that the denial of disability benefits to Betts was justified by age-related cost considerations. This "equal benefit or equal cost" principle has been a part of the federal regulations since 1969 and has a firm anchor in the 1967 and 1978 legislative history to the ADEA.

The purpose of § 4(f)(2) of the ADEA of 1967 was to permit employers to hire older workers without incurring the higher costs of some benefit plans, such as life insurance, where costs increase with age. The exception was intended to protect older workers in hiring by permitting employers to adjust benefits commensurate with age-related costs. The exception was not intended to provide a loophole for employers to discriminate against older workers.

When Congress amended the ADEA in 1978, it again focused its attention on § 4(f)(2). During the hearings, the floor debate, and in committee reports, Congress repeatedly stated its intent to permit employers to reduce disability benefits only to the extent reductions could be justified by age-related cost increases. As an exception from remedial discrimination legislation, § 4(f)(2) must be narrowly construed in a manner consistent with the purpose of eliminating arbitrary age discrimination.

The ADEA explicitly granted the Department of Labor ("DOL") the power to "establish reasonable exemptions" under the Administrative Procedures Act. The regulations, first issued by the DOL in 1969, required that for a plan to qualify for the § 4(f)(2) exception any reductions in benefits must be justified by age-related cost considerations. In 1978, Congress similarly instructed the DOL to issue regulations in keeping with the 1978 Amendments. The 1979 DOL regulations were more comprehensive and expressly addressed long-term disability plans. They were adopted by the Equal Employment Opportunity Commission (EEOC) in 1981.

The PERS disability plan operates in clear violation of EEOC regulation 29 C.F.R. § 860.120(f)(1)(iii). The regulation, now codified at 29 C.F.R. § 1625.10(f)(1)(ii) [53 F.R. 5973, Feb. 29, 1988], provides that where employees at younger ages are entitled to long-term disability benefits there is no justification for denying benefits altogether to older employees.

PERS argues that its disability plan is exempt solely because it predates the ADEA. In effect, PERS is arguing that in passing the ADEA, Congress intended to perpetuate all age-based benefits discrimination then in effect. This is contrary to the intent of Congress in enacting the ADEA in 1967 and is contrary to the express intent of Congress in passing the 1978 Amendments.

PERS' claim to perpetual exception improperly relied upon this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), which held that a plan in existence when the ADEA was passed could not be a subterfuge to evade the purposes of the Act. *McMann* was rejected by Congress when it passed the 1978 amendment to the ADEA. The Conference Report, approved by both Houses following the *McMann* decision stated:

> "The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments."

H.R.Conf.Rept. No. 95-950, p.8 (1978), U.S.Code Cong. & Admin. News 1978, p.529, *reprinted in EEOC Legislative History of the ADEA of 1967* ("EEOC Legislative History") at 519 (1981). The Sixth Circuit, below, held that in amending the ADEA in 1978, the Congress expressly repudiated *McMann*. The Court also reviewed the law, the regulations and the legislative history and held that the PERS plan is not exempt since it discriminated against older workers without economic justification. *Betts, supra*, 849 F.2d at 694 [A-4].

Regardless of the holding in *McMann*, the PERS plan is not exempt as a pre-existing plan. Substantial and relevant modifications have been made to the plan since 1974. *McMann* held that plans in existence *prior* to passage of the ADEA could not be a subterfuge. The clear implication was that changes to a plan *after* the ADEA could be a subterfuge and the plan would no longer be exempt. The circuit courts are unanimous in agreeing

that substantial and relevant modifications to plans after the passage of the ADEA can be a subterfuge. PERS made significant changes in 1976 and 1981 and is no longer entitled to an exception as a pre-existing plan.

The decision of the Sixth Circuit should be affirmed.

ARGUMENT

I. EMPLOYERS WHO DENY DISABILITY BENEFITS SOLELY ON THE BASIS OF AGE MUST SHOW AN AGE-RELATED COST JUSTIFICATION TO QUALIFY FOR THE § 4(f)(2) EXEMPTION TO THE ADEA.

A. PERS Failed To Meet Its Burden Of Proof Under § 4(f)(2).

Betts was denied both disability retirement benefits and the accompanying right to resume service solely because of her age.[4] In order to escape liability from this *per se* violation of the ADEA, PERS was required to justify its conduct under one of the ADEA's narrow affirmative defenses. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121-22 (1985). Acknowledging the age-based exclusion, PERS seeks refuge in the exception for bona fide employee benefit plans set forth in § 4(f)(2) of the ADEA. The burden of proof under § 4(f)(2) rests with the party invoking the defense, *see Western Airlines* v. *Criswell*, 472 U.S. 400, 416 n. 24 (1985), and that burden is substantial since § 4(f)(2) is to be narrowly construed as an exception to remedial social legislation. 29 C.F.R. § 860.120(a)(1); *Piedmont & Northern R. Co.* v. *ICC.*, 286 U.S. 299, 311-312 (1932); *Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). Accordingly, PERS must show that the challenged practice plainly and unmistakably meets

[4] Ohio Revised Code § 145.35 (exclusion of persons age 60 and older); Ohio Revised Code § 145.39 (right to resume service at same or similar position and salary).

the terms and spirit of the remedial legislation that the ADEA represents.

In response to Betts' motion for summary judgment, it was PERS' responsibility to come forward with evidence sufficient to demonstrate a triable issue of fact regarding the § 4(f)(2) defense, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986). PERS offered no evidence and raised no contested issues of fact in the District Court. "Despite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty." *Betts*, *supra*, 848 F.2d at 695. [A-6]. Ignoring contrary EEOC regulations, PERS argued that cost justification was not required by § 4(f)(2) and that its plan was exempt as a matter of law because the plan predated the ADEA.

Betts contends that the legislative history of the ADEA and long standing administrative regulations require that employers justify any reduction in benefit levels for older workers with proof that benefit costs increase with age. These requirements apply to all plans regardless of the date the plans were created. PERS failed to meet its burden of coming forward with evidence of cost justification in its response to Betts' motion for summary judgment. PERS was, therefore, correctly held liable for violating the Act.

B. Legislative History Of § 4(f)(2) Of The ADEA And Its Amendments Shows A Clear Congressional Intent That Benefits May Be Reduced Only To The Extent The Reduction Is Justified By Age-Related Cost Considerations.

The legislative history of the § 4(f)(2) exception shows a clear congressional intent that employee benefits, such as the PERS disability benefits, were to be reduced only to

the extent that such reductions were justified by age-related cost considerations. Without § 4(f)(2), an employer that failed to provide older workers the same employee benefits as younger workers would be in violation of the ADEA even though the cost of benefits for the older employee would be higher. Congress feared that, upon passage of the ADEA, some employers might discriminate in hiring older workers because of these higher costs. Section 4(f)(2) was intended to permit the employer to reduce the older worker's benefits and, thus, equalize the cost of benefits for younger and older workers without violating the ADEA.

PERS argues that the § 4(f)(2) exception, which was introduced to protect the older worker from hiring discrimination, permits employers to save money by providing no disabiiity benefits to the older worker. This would provide an unintended benefit to employers who discriminate against older workers.

1. The Purpose Of The § 4(f)(2) Exemption To The ADEA In 1967 Was To Benefit The Older Worker, Not To Provide A Loophole For The Employer To Discriminate.

The Administration bill to prohibit age discrimination in employment was introduced in the Senate on February 3, 1967. As introduced, Section 4(f)(2) of S.830 had no exception for employee benefit plans but instead exempted only mandatory retirement which was not a subterfuge to evade the purposes of the Act.

During the Senate hearings on age discrimination, March 15-17, 1967, the U.S. Chamber of Commerce testified that if the ADEA were applied to certain employee benefit plans, it might cause employers to discriminate in hiring older employees. Two concerns were mentioned by

this employer association. First, pension plans at the time often required that an employee work twenty years before he was vested in a retirement plan. The combination of long vesting requirements and forced retirement meant that workers hired after age 45 were usually excluded from pension plans. Employers did not want the ADEA to require any change in this arrangement. The second employer concern involved health and life insurance plans where variations in benefits for older workers were necessary "by cost and actuarial considerations."[5] These two concerns were addressed specifically by Congress.

First, Congress decided not to tackle forced retirement and vesting as part of the original ADEA legislation. Those reforms came later. Congress limited the vesting period for private pension plans to five years in 1974.[6] Congress prohibited forced retirement in 1978.

PERS, selectively citing to legislative history, incorrectly argues that the purpose of the § 4(f)(2) exception was to permit hiring of older workers without including them in employee benefit plans. [PERS Br. 35-39]. No such broad exclusion was ever endorsed by Congress in 1967. In fact, as set out above, the only exclusion debated was in response to the employers who wanted to preserve their long term vesting periods and mandatory retirement.[7]

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[5] *Age Discrimination in Employment: Hearings before the subcommittee on labor of the Senate Committee on Labor and Public Welfare on S. 830 and S. 788*, 90th Cong. 1st Sess. 105-106 (Statement of Anthony J. Obadal, U.S. Chamber of Commerce).

[6] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* ERISA does not apply to state run pension and benefit plans. *See* 29 U.S.C. § 1051.

[7] 113 Cong. Rec. 31255 (Nov. 6, 1967), Legislative History 146. (remarks of Senator Yarborough).

The second concern voiced by employers when the ADEA was proposed was the impact of the Act on the cost of benefits. Congress echoed this concern. During the Senate hearings, sponsors of the bill stated that if employers were required to provide identical benefits to newly hired older employees and younger employees, the higher cost of benefits to older workers could cause the Act to promote, rather than reduce, discrimination.

At the time the Senate voted on the Act in 1967, Senator Javits, who introduced the amendment giving § 4(f)(2) its final form, made the following statement by way of introducing discussion of the benefit plan provisions:

> "The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers *exactly* the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often *extremely high cost* of providing certain types of benefits to older workers, actually be discouraged from hiring older workers." (emphasis supplied)

113 Cong. Rec. 31,254-31,255 (Nov. 6, 1967), Legislative History 145-146. Senator Javits' statements about § 4(f)(2) are entitled to great weight in defining Congress' intent. *See, e.g. Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (a statement by one of the legislation's sponsors should be accorded substantial weight in interpreting the statute).

Section 4(f)(2) was drafted in general terms specifying only that "employee benefit plans such as pension, retirement and insurance plans" were to be exempt. From this language it was apparent that some, but not all, employee benefit plans were to be exempt. Congress made no

attempt to legislate in detail how § 4(f)(2) was to be applied to the numerous types of employee benefit plans ranging from defined benefit pensions to profit sharing plans, and including such diverse plans as sick leave, disability, insurance, severance pay, and prepaid legal services. Instead, Congress authorized the Department of Labor ("DOL") to issue regulations and establish reasonable exemptions. Section 9 of the Act (29 U.S.C. § 628) authorized the Secretary, in accordance with the Administrative Procedures Act, to:

> "issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such *reasonable exemptions* to and from any or all provisions of this Act as he may find necessary and proper in the public interest." (emphasis added)

It is clear that Congress intended the DOL to interpret and apply § 4(f)(2) exceptions to the multitude of employee benefit plans in existence at the time.

The first DOL interpretations, 29 C.F.R. § 860.120, were issued nearly contemporaneously with passage of the ADEA. [34 F.R. 9709, June 21, 1969]. The cost and benefit section of the regulations provided that an employer was not required to grant older workers identical benefits as younger workers. The section also stated that a plan would be in compliance where either the actual payment made or the cost incurred was the same as for a younger worker (equal benefits or equal cost). The regulation met the concern of Congress by removing the monetary incentive to discriminate in the hiring of older workers. At the same time, the regulations met the purpose of the ADEA "to prohibit arbitrary age discrimination in employment" and "to help employers and workers

find ways of meeting problems arising from the impact of age on employment." Section 2(b), 29 U.S.C. § 621(b).

2. The Legislative History Of The 1978 Amendment Confirms The Congressional Intent That The § 4(f)(2) Exception Be Limited To Age-Based Cost Justifications.

In 1976 and 1977, Congress held hearings on the ADEA to eliminate mandatory retirement, raise the age cap on private employment to 70, and eliminate the age cap entirely for most federal employees. On October 12, 1977, Senator Williams, of the Senate Committee on Human Resources, submitted the committee report to accompany H.R. 5383. The report addressed concerns that raising the upper age cap to 70 and eliminating mandatory retirement might have an adverse effect on the cost of employee benefit plans:

> Concerns were expressed regarding potential increased costs for employee welfare benefit plans such as *disability*, health, life and other forms of insurance for employees. *Presently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices.* Existing principles of law, including the § 4(f)(2) bona fide employee benefit plan exemption, as modified by these amendments, would be the standard by which these practices will be evaluated. (emphasis added)

S.Rep.No. 95-493, 95th Cong. 1st Sess. 5 (1977), U.S. Code Cong. & Admin. News 508, EEOC Legislative History 438. Congress clearly recognized that employers were adhering to the cost-based principles of the DOL regulations. When a Congress that reenacts a statute voices its approval of an administrative interpretation, Congress is treated as having adopted that interpretation, and courts are bound thereby. *U.S.* v. *Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 134 (1978).

Senator Williams, in reporting to the Senate, reiterated the committee's intention that DOL continue to use its rulemaking powers to interpret and implement the § 4(f)(2) exceptions. 123 Cong. Rec. 34295 (Oct. 19, 1977), EEOC Legislative History 482.

In *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 201, n.7 (1977), this Court noted that legislative observations 10 years after passage of the ADEA are in no sense part of the legislative history of the Act. At the time of that observation, the 1978 amendments had not yet been passed. However, committee reports and statements by sponsors immediately preceding passage of the ADEA Amendments of 1978, Pub. L. 95-256, 92 Stat. 198, are very relevant to an understanding of the 1978 Amendments.

Senator Williams, in introducing H.R. 5383, stated the present intent of the 1978 amendments to § 4(f)(2):

> "The purpose of this exception is to facilitate the hiring of older workers by permitting their employment without necessarily requiring an employer to provide equal benefits to them under retirement, insurance or *disability benefit plans*. Of course, there must be some reason *other than age which justifies the unequal benefits.*" (emphasis added)

123 Cong. Rec. 34295 (Oct. 19, 1977), Legislative History 482. Senator Williams added that "Section 4(f)(2) was intended to permit and *will continue* to permit varying coverage of workers in different age groups to reflect those differences so long as they are based on valid assumptions and applied in a nondiscriminatory manner."

(emphasis added) *Ibid.*, at 34295, EEOC Legislative History 482.

Following this Court's decision in *McMann* and just prior to passage of the 1978 Amendments, Congressman Waxman spoke on the need for employers to have actuarial data to support different benefit levels. PERS has quoted several snippets from Congressman Waxman's speech [Brief 43-44] distorting his intent. They are shown below in full context:

> I am hopeful, however, that employers do not terminate capable and healthy older workers from benefit plans solely on the basis of age. In the *absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purposes of the act.*
>
> While the conference committee did not specifically address the status of health benefits to older workers protected under this act, it is the intent of this Congress to prevent both open and subtle forms of age discrimination. Exceptions should only be applied in the strictest sense and only with full justification and cause. (emphasis added)

124 Cong. Rec. 7888 (Mar. 21, 1978), EEOC Legislative History 535.

Congressman Pepper, chairman of the House Select Committee on Aging and one of the principal authors of H.R. 5383, urged his colleagues to approve the conference report, stating:

> The exception under section 4(f)(2) of the act is just that—an exception—and as such must be viewed in the narrowest sense.
>
> * * *

> For example, employers may offer health and life insurance benefits to older workers that are different from those of other employees. The original reason for this exception was to promote the hiring of older persons. *Passage of this act should not be construed by any employer, or any court, to permit the sudden total and unilateral termination of a capable and healthy worker from a health, insurance or other welfare benefit plan solely on the basis of age and without full economic justification.* (emphasis added)

124 Cong. Rec. 7886 (Mar. 21, 1978), EEOC Legislative History 532.

Senator Javits responded to employers' concerns that the 1978 amendments, which prohibited involuntary retirement and raised the upper age from 65 to 70, might increase costs for employee welfare benefit plans, such as life, health, and disability programs. He noted that "some plans currently reduce coverage for older workers" and emphasized that:

> [T]hese amendments do not change present law regarding these practices.
>
> * * *
>
> The purpose of section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers.

124 Cong. Rec. 8218, (March 23, 1978) EEOC Legislative History 539. He added that the DOL intended to "promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans." 124 Cong. Rec. 8219, EEOC Legislative History

540. As set out below the agency regulations that have guided employers covered by the Act have always required cost based justifications in order to reduce benefits as a worker grows older.

C. The PERS Disability Plan Violates EEOC Regulations.

1. The PERS Disability Plan Is In Clear Violation of 29 C.F.R. § 860.120(f)(1)(iii).

The PERS disability plan, which totally excludes workers who become disabled after age 60, clearly violates 29 C.F.R. § 860.120(f)(1)(iii)[8] which deals exclusively with long-term disability plans:

> (W)here employees who are disabled at younger ages are entitled to long-term disability benefits, *there is no cost-based justification for denying such benefits altogether,* on the basis of age, to employees who are disabled at older ages. . . . Reduction on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable *only on the basis of age related cost considerations* as set forth elsewhere in this section. (emphasis added)

The regulation permits age-based reductions in the level of benefits under long-term disability plans only where justified by age-related cost considerations. The regulation also provides two additional approaches for reducing benefits where such reductions can be justified by age-related costs. The first method requires continuation of benefits for older workers but permits reduction in the level of benefits. The alternative is to pay full benefits but for a reduced duration. The regulations also provides for other patterns of reduction if supported by cost data.

[8] 29 C.F.R. § 860.120(f)(1)(iii), which was in effect when Betts was denied disability benefits, was first issued by the DOL June 21, 1979 [34 F.R. 9709]. This regulation was redesignated 29 C.F.R. § 1625.10(f)(1)(iii) by the EEOC in 1987 [52 F.R. 23812, June 25, 1987]. In 1988, 29 C.F.R. § 1625.10(f)(1)(iii) was revised to include 1986 changes to the ADEA and was redesignated 29 C.F.R. § 1625.10(f)(1)(ii) [53 F.R. 5973].

The PERS disability plan fails to comply with any of the several methods provided by the regulations. Instead, the PERS plan denies disability benefits *altogether* for those disabled after age 60. This is in clear violation of § 860.120(f)(1)(iii) which specifically prohibits cutting off benefits altogether because of age.

2. The EEOC Regulations Have Guided Employers For Twenty Years And Are Entitled To Great Deference.

Consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference. *NLRB* v. *Boeing Co.*, 412 U.S. 67, 74-75 (1973), *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). "Moreover, such a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1980). Courts give extra authoritative weight to interpretative rules which are made contemporaneously with the enactment of the statute, which have been followed consistently over a long period, or which were outstanding at the time of statutory reenactment. 2 K.Davis, *Administrative Law Treatise* § 7.14 (2d ed. 1979); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). For over 20 years the DOL/EEOC regulations have consistently held that employee benefit plans may reduce benefits to older employees only to the extent

the reductions can be justified by cost considerations and the regulations have survived reenactment of the Act.

The regulations are entitled to deference because they were issued contemporaneously both with the Act and again with its Amendments. They have consistently articulated the "equal benefit or equal cost" principle since first issued in 1969. Shortly after passage of the ADEA, the DOL issued 29 C.F.R. § 860.120 [34 F.R. 9709, June 21, 1969] which interpreted § 4(f)(2). The cost and benefit section, 29 C.F.R. § 861.120(a), provided:

> "Thus, an employer is not required to provide older workers . . . the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance *plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.*" (emphasis added)

In 1978, when it amended the ADEA, Congress made it clear that the DOL should issue more comprehensive guidance with respect to § 4(f)(2), particularly because of the increase in number of older workers expected as a result of raising the coverage to age 70 and the prohibition of mandatory retirement.

On September 22, 1978, the DOL published its proposed amendment to § 860.120 and invited public comment [43 F.R. 43264]. After considering numerous written comments as well as testimony at a hearing on the proposed amendment to § 860.120, the DOL revised its original proposal and published its final regulation [44 F.R. 30658, May 25, 1979]. The regulation on long-term disability plans, § 860.120(f)(1)(iii), was consistent with the 1969 regulations in that it prohibited a complete cutoff of benefits because of age and permitted only reductions which could be justified by age-related costs.

The regulations are also entitled to deference because Congress delegated to the DOL the authority to "to issue such rules and regulations as it may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as it may find necessary and proper in the public interest." Pub.L. 90-202, § 9, 81 Stat. 602 (29 U.S.C. § 628). The power granted to the DOL was far more extensive than the authority to issue "procedural rules" which Congress granted to the EEOC under Title VII. 42 U.S.C. § 2000e-12. *General Electric* v. *Gilbert* 429 U.S. 125, 140-146 (1976). Moreover, even regulations issued under the limited authority of Title VII are entitled to great deference when issued contemporaneously with the Act. *Griggs, supra.*

The regulations are further entitled to deference because Congress has amended the ADEA to change the effect of certain of these regulations while leaving untouched the long term disability regulations. In 1982, Congress disagreed with EEOC regulation § 860.120-(f)(1)(ii),[9] pertaining to health care benefits and amended the ADEA "by requiring an employer to offer his employ-

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[9] § 860.120(f)(1)(ii) was removed following the 1986 amendments to § 4(g), 29 U.S.C. § 623(g). [53 F.R. 5791, Feb. 29, 1988].

ees age 40 or over but under age 70 the same health benefits offered the employer's younger employees." Section 4(i), 29 U.S.C. § 623(i). P.L. 97-248, 1982 U.S. Code Cong. & Ad. News 792-793. In 1986, Congress added § 4(i) Pub.L. 99-509, § 9201 to make it unlawful to reduce pension benefits because of age. The pension benefits amendment was prompted by an announcement by the EEOC that it intended to rescind a subsection in 29 C.F.R. § 860.120 which pertained to pension benefits and to issue a new interpretation. U.S. Code Cong. & Admin. News, Legis. History 4023 (1982). Again, although Congress was well aware of the EEOC regulations relating to disability plans, it made no changes in them.

Finally, the regulations are entitled to great deference because employers have relied upon them, and to a great extent obeyed them, for over twenty years. Section 7(e) of the ADEA, 29 U.S.C. § 626(e), incorporates 29 U.S.C. § 259 of the Portal-to-Portal Act which states that employers are not subject to liability if they acted in reliance on any written administrative regulation, ruling, or interpretation.

During the 1982 Senate hearings, the U.S. Chamber of Commerce, recognizing the importance of the EEOC regulations in providing guidance to industry, went so far as to urge Congress to codify the then current regulations pertaining to "bona fide employee benefit plans" by making them part of the ADEA itself, stating:

> "The legislative history and the DOL I.B. [Interpretive Bulletin] have proven to be exceedingly helpful in easing compliance by business with an aspect of the 1978 amendments which could have been costly and disruptive to employee benefit arrangements. Despite their salutary effect, they do not offer certainty since the I.B. is not incorporated in the ADEA."

Hearing to Eliminate Mandatory Retirement: Hearings on H.R. 6576 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 2nd Sess. 36 (1982) (Statement of Robert T. Thompson, Chamber of Commerce of the United States). Congress did not incorporate the regulations into the Act. Instead, in 1982, the committee again stated that it expected the DOL to establish regulations in keeping with the amendments. U.S.Code Cong. & Admin. News. Legis. History 793 (1982). Even, the Equal Employment Advisory Council ("EEAC"), an employer group which has filed an *Amicus* brief supporting PERS in this case, has advised employers to rely on these regulations:

> "[s]ince the 1978 Amendments to the ADEA extended ADEA protection to age 70, *employers may no longer engage in the common practice of completely cutting off long-term disability benefits* for all disabled employees and long-term coverage for all active employees *at age 65*. However, employers may lawfully reduce long-term disability benefits for older employees who are under 70 when such reductions are *cost justified*." (emphasis added)[10]

In summary, the regulations meet all of the tests for deference. They are consistent with the legislative history, they were issued contemporaneously with the Act and its amendments, and employers have relied upon them for over 20 years.

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[10] *AGE DISCRIMINATION IN EMPLOYMENT ACT: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* p.339. Published by the Equal Employment Advisory Council (1982).

II. THE 1978 AMENDMENTS TO THE ADEA OVERTURNED THIS COURT'S REASONING AND DECISION IN *McMANN* THAT PRE-EXISTING PLANS WERE NOT A SUBTERFUGE.

PERS argues that its disability plan is beyond the reach of the ADEA solely because the plan was in existence when the ADEA was passed. [PERS Br. pp.16-21]. It relies upon this Court's decision in *McMann*, which held that a conceded "bona fide employee benefit plan" established before passage of the ADEA which permitted involuntary retirement could not be a subterfuge to evade the Act. PERS argues that this Court's definition of "subterfuge" makes its disability plan exempt under § 4(f)(2) even though it would otherwise be in violation of the ADEA. In effect, PERS argues that in passing the ADEA, Congress intended to perpetuate all age-based benefits discrimination then in effect.

A. The Legislative History Of The 1978 Amendments Shows A Clear Intent To Reject This Court's Definition Of Subterfuge In *McMann*.

The legislative history of the 1978 Amendments to the ADEA makes it abundantly clear that Congress not only overturned this Court's decision in *McMann* but rejected its definition of "subterfuge" as well. Congress specifically stated that plan provisions in effect prior to enactment of the ADEA were not exempt by virtue of the fact that the plan predated the Act.

In 1977, when Congress was considering amendments to the ADEA, it was aware of the three mandatory retirement cases with conflicting reasoning and results; *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), *McMann* v. *United Airlines*, 542 F.2d 217 (4th Cir. 1976)

and *Zinger* v. *Blanchette*, 549 F.2d 901 (3rd Cir. 1977).[11] In *Taft Broadcasting*, the Fifth Circuit ruled that a retirement plan "effectuated far in advance of the enactment of the law" could not be a subterfuge for evasion of the Act. 500 F.2d at 215. In contrast the Fourth Circuit, in *McMann*, ruled that forced retirement pursuant to a pre-Act plan would be considered a "subterfuge" to evade the purposes of the Act absent an employer's showing of a legitimate business purpose for the age-based action. 542 F.2d at 220.

The Senate Report, accompanying the bill to amend § 4(f)(2), H.R. 5383, expressly rejected the Fifth Circuit's reasoning in *Taft Broadcasting* that a pre-existing plan could not be a subterfuge stating:

> "The *[Taft]* court found the language of the section unambiguous and refused to consider the legislative history. *It concluded, erroneously in the committee's view, that a plan could not be a subterfuge within the meaning of the section 4(f)(2) if it was operative before the effective date of the act.* (emphasis added)

S.Rep. No. 95-493, (Comm. on Human Resources) 95th Cong., 1st Sess. 10 (1977), EEOC Legislative History 443.

In 1977, both Houses passed H.R. 5383 to amend § 4(f)(2) to prohibit involuntary retirement and sent the bill to the Conference Committee to resolve differences in other parts of the bill. While the bill was still in the Conference Committee, this Court decided *McMann*, holding that a bona fide retirement plan could not con-

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[11] H.R. Rep. No. 95-527, Part I, 95th Cong. 1st. Sess. 5 (1977), EEOC Legislative History 365 and S. Rep. 95-493, 95th Cong. 1st Sess. 10 (1977), Legislative History 443.

stitute a subterfuge to evade the Act if the plan predated the Act.

The Conference Committee, in its report to both houses, disagreed with this Court's reasoning in *McMann*. The Conference Report, which was voted on and approved by both Houses, stated that the amendments were intended to overturn *McMann:*

> "In *McMann* v. *United Airlines*, 98 S.Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 ((1976). *The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.*" (emphasis supplied)

H.R. Conf.Rept. No. 95-950, p. 8 (1978), U.S. Code Cong. & Admin. News p.529, EEOC Legislative History 519.

Since the Conference Report represents the final statement agreed to by both houses of Congress, next to the statute itself, it is the most persuasive evidence of congressional intent. *Demby* v. *Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981). *See also, Nat. Ass'n of Greeting Card Pub.* v. *U.S. Post Ser.*, 462 U.S. 810, 832 n.28 (1983) (conference committee reports are entitled to great weight). Congress, in approving the Conference Committee Report, made it abundantly clear that pre-existing plans were not to be exempt because they predated either the ADEA or the 1978 Amendments.

On the day the House agreed to the conference report, Congressman Hawkins, one of the House Managers, reported to the House:

> "The conferees specifically disagree with the Supreme Court's holding and reasoning in that case *[McMann]*, particularly its conclusion that an *employee benefit plan* which discriminates on the basis of age is protected by section 4(f)(2) because it predates the enactment of the ADEA." (emphasis added)

124 Cong. Rec. 7881 (Mar. 21, 1978), EEOC Legislative History 528.

The Senate also expressed its disapproval of this Court's decision in *McMann*. *See* remarks of Senator Javits, 124 Cong. Rec. 8218 (Mar. 23, 1978) EEOC Legislative History at 539 ("As stated in the conference report, the 'conferees specifically disagree with the Supreme Court's holding and reasoning in that case.'") Following debate, the Senate agreed to the conference report on March 23, 1978, and the President signed the bill on April 6, 1978.

PERS' argument [PERS Br. pp.16-23], that Congress intended only to overrule the result in *McMann* as to involuntary retirement, is without merit. In circumstances similar to these, this Court has held invalid both the reasoning and the holding of a decision "overtuned" by Congress. In *Newport News Shipbuilding & Dry Dock* v. *EEOC*, 462 U.S. 669 (1983), the Court construed the Pregnancy Discrimination Act of 1978 which was passed for the express purpose of overturning the decision in *General Electirc Co.* v. *Gilbert*, 429 U.S. 125 (1975). In *Newport News*, the Court rejected the argument that Congress intended only to overrule Gilbert's result and held that "Congress . . . *unambiguously expressed its disapproval of both the holding and the reasoning of the court in the Gilbert Decision*, 462 U.S. at 678 (emphasis added).

Congress' repudiation of the "holding and reasoning" of *McMann* is entitled to the same effect here. As the House and Senate Conference Committee Report recites in no uncertain terms, "[p]lan provisions in effect prior to the date of enactment are not exempt under § 4(f)(2) by virtue of the fact that they antedate the act or these amendments."

The Sixth Circuit, below, held that Congress, in passing the 1978 Amendments, repudiated this Court's reasoning in *McMann*. *Betts*, *supra*, 842 F.2d at 694 [A-4]. The Ninth and Tenth Circuits have ruled to the contrary. Both circuits admitted that the legislative history of the 1978 Amendments demonstrates congressional intent to overturn *McMann*. They claim that Congress failed to accomplish that result, however, by not specifically drafting a definition of subterfuge that would remove protection for pre-existing plans. *EEOC* v. *County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988) and *EEOC* v. *Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988). This argument disregards the fact that the DOL issued a specific definition of subterfuge as applied to employee benefit plans in 1979. 29 C.F.R. § 860.120(d) [44 F.R. 30658, May 25, 1979]. The 1979 DOL definition of subterfuge, 29 C.F.R. § 860.120(d), which is still in effect today at 29 C.F.R. § 1625.10(d), requires that lower benefits for older workers be justified by age-related cost considerations. *See EEOC* v. *City of Lebanon*, 842 F.2d 1480, 1488-90 (3rd Cir. 1988); *Karlen* v. *City College of Chicago;* 837 F.2d 314, 319 (7th Cir. 1988), cert *denied*, No. 87-1831. Relying on the 1978 ADEA amendments, however, the DOL regulations gave no protection to plans in effect prior to passage of the ADEA. Further, Congress, fully aware of the subterfuge regulation, has repeatedly amended the ADEA but has not amended that DOL definition of subterfuge.

This analysis of the two circuits also disregards the fact that when this Court decided *McMann*, both houses had already passed H.R. 5383 with similar wording as to § 4(f)(2) and the bill was in conference committee for resolution of differences in other sections. The conference managers, being limited to the matters in dispute, would have exceeded their authority had they revised § 4(f)(2) to include a definition of subterfuge.

PERS suggests that the legislative history of the 1978 Amendments should be ignored since Congress did not specifically define subterfuge in the text of the 1978 Amendment. [PERS Br. p.22] The PERS position conflicts with the analysis by this Court of a similar problem under § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1) which establishes a bona fide occupational qualification (BFOQ) defense. *See Western Airlines* v. *Criswell*, 472 U.S. 400 (1985). Section 4(f)(1) of the ADEA had not been amended in the 1978 Amendments. Nonetheless, this Court reviewed the 1978 legislative history and noted that Congress had endorsed an approach to BFOQ issues developed by the Fifth Circuit in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). *Id.* at 415. Those same sources of legislative history relied upon by this Court in *Criswell* establish Betts' position here: that Congress refuted the "reasoning" of the Fifth Circuit in *Taft Broadcasting Co.* and of the Supreme Court in *McMann*, and that it endorsed the decision of the Fourth Circuit in *McMann*, which held that all employee benefit plans, regardless of their temporal origin, must demonstrate a legitimate business purpose to satisfy the "subterfuge" standard of § 4(f)(2).

B Congress Did Not Intend To "Grandfather" Unlawful Practices In Perpetuity

If Congress failed to overturn the reasoning of *McMann*, as PERS argues, then plans existing at the

time Congress outlaws a practice are granted perpetual immunity, and only new employers or employers with new plans are required to obey the law.

This is clearly contrary to the intent of Congress. The 1967 Committee Reports of both houses expressly state: "It is important to note that [§ 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans."[12] *See McMann* 434 U.S. at 219 n. 13 (Marshall, J., dissenting).

When Congress makes a practice illegal but wishes to "grandfather" existing practices, it does so explicitly and with an expiration date. This is precisely what Congress did in 1978 and 1986. In 1978, it provided that bargaining agreements would not be affected by the 1978 amendment to § 4(f)(2) until January 1, 1980 or the expiration date of the agreement, whichever first occurred. Pub.L. 95-256, 92 Stat. 189. Bargaining agreements were likewise "grandfathered" from compliance with the 1986 amendments to § 4(g)(1) (group health plans) until January 1, 1990. Pub.L. 99-592. There is nothing in the remainder of the 1978, 1982, 1984 or 1986 amendments nor in their legislative history to indicate that employee benefit plans in existence at the time of the amendments' effective dates were to be exempt other than as noted above.

As noted above, in 1978, 1982, 1984 and 1986, Congress amended the ADEA to prohibit practices which previously had been legal. In 1978, it amended Section 12; 29 U.S.C. § 631 to prohibit discrimination against employees aged 65-69. Pub.L. 95-256, 92 Stat. 189, 190. In 1982, it

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[12] H.R. Rep. No. 805, 90th Cong. 1st Sess. p.4 (1967), EEOC Legislative History 74; S. Rep. No. 723, 90th Cong. 1st Sess. p. 4 (1967) EEOC Legislative History 105, U.S. Code Cong. & Admin. News. 1967, p. 2217.

added Section 4(g); 29 U.S.C. 623(g) to provide that employees age 65-69 were to be entitled to the same group health plan coverage as younger employees and in 1984 Section 4(g) was amended to extend the same coverage to spouses of employees age 65-69. Pub.L. 97-248, 96 Stat. 353 and Pub. L. 98-369, 98 Stat. 1063. In 1986, Congress amended the Act to remove the age 70 cap and to prohibit certain discriminatory pension plan practices. Section 4(i), 29 U.S.C. 623(i); § 11, 29 U.S.C. § 631, Pub.L. 99-592, 100 Stat. 3342 and Pub.L. 99-709, 100 Stat. 1973.

If the *McMann* reasoning that pre-existing plans are exempt under § 4(f)(2) has not been overturned, as PERS claims, then not only are pre-1967 employee benefit plans free to discriminate but employee benefit plans existing when the 1978, 1982, 1984, and 1986 amendments were passed are exempt from those changes in the ADEA as well. Companies with pre-existing plans that would be permitted to discriminate would have a competitive edge over companies with newer plans who would have to comply with the ADEA. Furthermore, there would be no incentive to modify or improve their plans since pre-existing plans would then lose their exception.

Congress clearly did not intend such absurd results. In 1978, it stated that "[p]lan provisions in effect prior to the date of enactment are not exempt under § 4(f)(2) by virtue of the fact they antedate the act or these [1978] amendments." H.R. Conf. Rep. No. 950, p. 8 (1978), EEOC Legislative History 519. It is obvious that in enacting subsequent amendments in later years, Congress expected existing plans to conform.

Other employers and benefit plan administrators across the country have been conforming pre-existing plans to these amendments and the EEOC regulations. PERS should be required to do so as well.

III. REGARDLESS OF THE EFFECT OF THE 1978 AMENDMENTS TO THE ADEA ON *McMANN*, THE PERS DISABILITY PLAN IS NOT EXEMPT UNDER § 4(f)(2).

A. Depriving Betts of PERS Disability Benefits Resulted In Her Involuntary Retirement In Violation of § 4(f)(2).

By denying Betts disability retirement benefits because of her age, PERS forced her into involuntary retirement.

Under Ohio law, a person receiving disability benefits is still considered an employee with important reemployment rights. A disability recipient is placed on a leave of absence for five years. The recipient has a guaranteed right to return to his job if he should recover within that period.[13] A person on service retirement has no such guaranteed reemployment rights. Thus, forcing Betts into service retirement instead of granting her access to the disability plan terminated her from employment. On disability, Betts would still be an employee today, on leave of absence status, with mandatory reemployment rights should she recover.

In 1978, Congress amended the ADEA to specifically prohibit involuntary retirement by adding to § 4(f)(2):

> "except that no such employee benefit plan . . . shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual."

Section 2(a) of the ADEA Amendments of 1978, Pub.L. 95-256, 92 Stat. 189, 29 U.S.C. § 623(f)(2). Thus, the

[13] O.R.C. § 145.39 provides: "A disability retirant shall retain his membership status. Also, he shall be considered on leave of absence from his position of employment during his first five years on the retired list, notwithstanding any contrary provisions in this chapter."

§ 4(f)(2) defense is not available to PERS because the disability plan caused or permitted Betts involuntary retirement.

This Court, in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), applied the 1978 amendment and held that by depriving TWA pilots over age 60 of the option of transferring to flight engineer, an option that was available to younger pilots, the TWA seniority system forced involuntary retirement in violation of § 4(f)(2). Likewise, by depriving Betts of participation in the disability plan which included the right to return to her old job, an option that was available to younger employees, the PERS disability plan forced her into retirement in violation of § 4(f)(2). *See also, EEOC* v. *Westinghouse Corp. (Westinghouse I)*, 725 F.2d 211, 223 n.8 (3rd Cir. 1983), *cert. denied* 469 U.S. 820 (1984) (Denial of layoff benefits to employees age 55 or older which resulted in loss of recall rights might constitute involuntary early retirement).

Writing in an *Amicus*, the California State Teachers' Retirement System has cited to legislative history which suggests that the 1978 amendment to the Act was designed only to prevent the forced retirement of able-bodied workers, those who were otherwise able to perform their duties. Congress wanted to make sure that the ADEA did not prevent employers from removing incompetent workers from the job. That is not the issue here. June Betts does not challenge her termination from her status as a full-time employee. Rather, she contests her forced termination from employment status altogether, specifically from the leave of absence status she should have had as a participant in the disability plan. She was fully qualified for a leave of absence under the PERS disability benefits plan which would have given her five years of reemployment rights. She was denied those ben-

efits because of her age, however, and forced to take service retirement. This type of forced retirement is prohibited by § 4(f)(2).

As the District Court below recognized, "plaintiff was presented with a choice of early retirement or nothing (a livelihood or none)" and therefore "plaintiff was forced into retirement because of her age." *Betts*, *supra*, 631 F.Supp. at 1205 [A-30]. The Sixth Circuit agreed, describing the effect of the disability plan as "forcing length of service retirement." *Betts*, *supra*, 848 F.2d at 694 [A-5].

B. The PERS Plan Is Not A Pre-ADEA Plan Because Of Significant Post-Act Modifications.

PERS argues that because its plan was in existence years before the ADEA it is permitted to continue its discriminatory practices, citing this Court's decision in *McMann*. [PERS Br. pp.16-21]. As set out above, that argument is incorrect in light of congressional actions overturning *McMann*. Moreover, that argument has no relevancy to the facts in this case because the Ohio legislature made significant and relevant changes to the PERS disability and retirement plans in 1976 and 1981.

While *McMann* held that a plan in existence *prior* to the passage of the ADEA could not be a subterfuge to evade the purposes of the Act, the clear implication was that significant changes to a plan *after* passage of the ADEA could be a subterfuge. The circuits are unanimous in agreeing that a Pre-ADEA plan that is modified after passage of the ADEA can be a subterfuge if the change is relevant.[14] The Sixth Circuit, below, did not reach this

[14] *See*, *Cipriano* v. *Board of Educ. of City School Dist.*, 785 F.2d 51, 58 (2nd Cir. 1986), *Sikora* v. *American Can Co.*, 622 F.2d 1116, 1124 (3rd Cir. 1980), *EEOC* v. *Baltimore and Ohio R. Co.*, 632 F.2d 1107, 1112 (4th Cir. 1980), *Smart* v. *Porter Paint Co.*, 630 F.2d 490, 495 (7th Cir. 1980), *EEOC* v. *Orange County*, 837 F.2d 420, 423 (9th Cir. 1988), and *EEOC* v. *Cargill*, 855 F2d 682, 686 n.4, (10th Cir. 1988).

issue because it ruled that Congress had overruled *McMann*.

After ADEA became law in 1967, it was amended in 1974 to bring state and local governments under its ambit. Since 1974, PERS has made changes to the plans nearly every year, several of which have significantly disadvantaged employees who become disabled after age 60.

Prior to 1976, the calculations of benefits for disability retirement and service retirement were similar. [PERS Br. p.5]. However, in 1976, the Ohio legislature amended § 145.36 to put a floor under disability benefits so that no one with 5 years service who became disabled would ever receive benefits of less than 30% of their Final Average Salary (FAS).[15] No similar floor was added to service retirement. When Betts became disabled she was denied this 30% minimum solely because she was 61 years old. She received $158.50 per month on service benefits as opposed to the $355.02 per month she would have received on disability benefits.

There can be no doubt that the 1976 change to the PERS disability plan was relevant and significant. It is that very change that causes Betts to be paid nearly $200 per month less than workers with identical service years who became disabled before age 60.

The second modification occurred in 1981 when the service retirement plan was amended to require 10 years of service credit in order for service retires to be eligible for group hospital and medical benefits.[16] This 10 year service credit requirement did not apply to employees

[15] Ohio Revised Code § 145.36 with the 1976 changes is printed in full on A-1 of Appellee's Motion to Affirm.

[16] Ohio Revised Code § 145.58. The effective date of this change was delayed five years and did not adversely affect appellee.

eligible for disability benefits. Thus, the disabled, who are in greatest need of hospital and medical benefits, are denied these indispensable services because of their age if they become disabled after age 60 and have less than 10 years of service credit. The 1981 amendment to O.R.C. § 145.58 coupled with the age disqualification of the disability plan combine to deprive disabled members of hospital and medical benefits solely on the basis of their age.

These two changes following passage of the ADEA, deprive many public employees who become disabled after age 60 of the 30% minimum benefit and of hospital and medical benefits.

If, in fact, the PERS disability plan was exempt because it was in existence when the ADEA was passed in 1967, this exception was lost when PERS made significant changes in 1976 and 1981 which adversely affect benefits for employees who became disabled after age 60.

CONCLUSION

This Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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